IN THE

Supreme Court of the United States

October Terms 1976

No. 76-1493

CARL E. BROWN,

Petitioner,

vs.

UNITED STATES,

Respondent.

BRIEF FOR THE STATES OF MINNESOTA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRONSON C. LaFOLLETTE
Attorney General of the
State of Wisconsin
Department of Justice
Madison, Wisconsin 53702

WARREN SPANNAUS
Attorney General of the
State of Minnesota
C. PAUL FARACI
Deputy Attorney General
PHILIP J. OLFELT
Assistant Attorney General
STEVEN G. THORNE
Special Assistant Attorney
General
375 Centennial Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-3294

Attorneys for Amici Curiae

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Terms 1976

No. 76-1493

CARL E. BROWN,

Petitioner,

vs.

UNITED STATES,

Respondent.

BRIEF FOR THE STATES OF MINNESOTA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted pursuant to U. S. Sup. Ct. Rule 42(4) in support of the petition of Carl E. Brown for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *United States v. Brown*, No. 76-2017 (8th Cir., rehearing den. April 19, 1977).

QUESTION PRESENTED

Do regulations promulgated on the authority of the Property Clause by the Secretary of the Interior for the governance of national parks have any effect outside of federally-owned lands and waters in Voyageurs National Park absent an affirmative cession of jurisdiction by the State of Minnesota?

INTEREST OF AMICI CURIAE

Voyageurs National Park, an area of some 219,000 acres, lies entirely within the State of Minnesota. A significant portion of this area consists of lakes and streams,[1] which are in no way property of the United States. Likewise, of the land area of the park a significant portion remains in private hands.[2]

The State of Minnesota has never ceded to the United States any of its sovereign jurisdiction over any part of the area inside the park boundaries. Eighth Cir. Op. at 5-6; Memorandum of the Dist. Ct. at 3. Yet the United States Park Service has taken the position that its general regulations for the governance of National Parks (36 C.F.R. c. 1), which include the hunting prohibition at issue here, apply not only on lands owned by the United States inside the park, but on public, navigable waters as well, regardless of whether the state has ceded jurisdiction. The instant case lends support to this position.

The negative impact of this position on the States of Minnesota and Wisconsin, as well as on the many other states similarly situated, is apparent. If the United States is correct, it may acquire general police powers over portions of a state by the relatively simple device of securing a congressional declaration that a particular area within the State is a national park, national monument, national lakeshore, or any of a myriad of similar federal areas. No longer will it be necessary to achieve this goal by the traditional means of either persuading Congress to appropriate money to purchase interests in the lands or waters over which the United States wishes to

[1] The Court of Appeals found that the park contains approximately 139,000 acres of land and 80,000 acres of water. 8th Cir. Op. at 3.

[2] At the time of the decision by the District Court (Nov. 6, 1976), 26,000 acres remained in private ownership. Memorandum of the Dist. Ct. at 11.

exert a measure of federal police power or convincing a state legislature to cede legislative jurisdiction.

Apparently the only limit on this new, simpler, and cheaper method of extending federal jurisdiction advocated by the United States would be that the United States own at least some land in the area. This at least would be necessary to support the fiction that this federal power derives from the Property Clause.[3]

To the extent that the United States is permitted to exercise such powers, the states are pre-empted. Although the powers of the United States and the State would be nominally concurrent, any federal regulations would supersede any conflicting state regulations. The powers of the State would be subordinated to the powers of the United States.

The instant case is an excellent example of how in this way state jurisdiction can be supplanted by an aggressive federal government. The State of Minnesota long supported the establishment of a national park in the State.[4] The efforts of interested Minnesotans were instrumental in securing the introduction and passage of the Voyageurs National Park Act, 16 U.S.C. §§ 160-160k. And it is undeniable that without the subsequent *donation* by the State of approximately one-fourth of the land area of the park, at a cost to itself of some five million dollars, the park would not exist today. See 16 U.S.C. § 160a.

Following establishment of the park, the State's interest in and dedication to the park continued. The Commissioner of Natural Resources, for example, prohibited "the hunting and

[3] U. S. Const., Art. IV, § 3, cl. 2.

[4] In 1891 the Minnesota Legislature adopted Concurrent Resolution No. 13 urging Congress to establish a national park in the Rainy Lake - Lake Kabetogama area.

trapping of all wild animals" within the boundaries of Voyageurs National Park, except on the waters of a tiny portion of Black Bay of Rainy Lake.[5] Commissioner's Order No. 1947, Petitioner's Appendix at A-40 to A-41.

However, in spite of the State's long-term commitment to the park, the Park Service would deny the State any meaningful role in its management. Not satisfied with a cooperative approach to the management of the area, an approach which has worked well for many years in the nearby Boundary Waters Canoe Area of the Superior National Forest,[6] the National Park Service has asserted jurisdiction over public navigable waters inside Voyageurs National Park to the preemption of state jurisdiction.

In summary, the sovereign governmental interests of the States of Minnesota and Wisconsin are directly and adversely affected by this decision. It effectively deprives the State of Minnesota and its people of any direct means of influencing the development and management of an area which has considerable importance to both. The decision is contradictory to the traditional position taken by the United States in the neighboring Boundary Waters Canoe Area. The fundamental question here is not Carl E. Brown's innocence or guilt, but the relative jurisdictions of the State and Federal Governments and the proper relationship of these two elements of our federal system.

---

[5] The intended location of the park boundary in this area has been the subject of considerable confusion and dispute. Both former Governor Anderson and present Governor Perpich have requested Congress and the Secretary of the Interior to resolve the matter.

[6] This relationship may very well, be jeopardized if the decision here is allowed to stand, but until now the State has regulated activities on the waters of the Boundary Waters Canoe Area and the United States has regulated activities on federal land. The United States has traditionally recognized the State's jurisdiction over the waters of the Boundary Waters Canoe Area. Language of cession in relation to the Boundary Waters Canoe Area of the Superior National Forest (Minn Stat. § 1.045 (1976)) is identical to language of cession in relation to Voyageurs National Park (Minn. Stat. § 84B.06 (1976)).

REASONS FOR GRANTING THE WRIT

I. THE ISSUES RAISED IN THIS CASE ARE OF MAJOR IMPORTANCE TO EVERY STATE THAT CONTAINS A NATIONAL PARK OR SIMILAR FEDERAL AREA ADMINISTERED BY THE UNITED STATES UNDER ITS PROPRIETARY JURISDICTION.

There are 287 units in the national park system.[7] United States Department of the Interior, *Index of the National Park System* at 12-13 (1975). They are scattered throughout the United States and their statutory outer boundaries encompass some 31,000,000 acres of land and water. *Id.* The United States may or may not own all of the area inside the boundaries of a particular unit,[8] yet according to the House committee report accompanying a recent amendment (Pub. Law. No. 94-458) to the basic statutes governing the national park system:

> Most National Park System areas are subject to proprietorial jurisdiction wherein the agency has only the rights of any landowner.

H. Rep. No. 94-1569, 94th Cong. 2nd Sess., U.S. Code Cong. and Adm. News 4714, 4715. A similar statement appears in the Senate Report:

---

[7] The "national park system" is defined to "include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park monument, historic, parkway, recreational, or other purposes." 16 U.S.C. §1c(a).

[8] Excluding Big Cypress National Preserve, Big Thicket National Preserve, Cuyahoga National Recreation Area, and Grand Canyon National Park, which together contain a gross area of 1,400,000 acres, but for which federal and non-federal acreages are not available, the system contains 27,788,724 federal and 1,429,430 non-federal acres. *Id.*

> The majority of the areas of the National Park System are presently administered under proprietorial jurisdiction with approximately 36 areas administered by exclusive legislative jurisdiction.

The question of the extent to which this proprietorial jurisdiction applies to lands and waters which, although inside a unit of the national park system, are not owned by the United States, is thus of fundamental and major significance to many states. It is also a question of serious import to the relationship of federal and state governments in our federal system. And, like the issue in *United States v. Coleman*, 390 U.S. 599, 601 (1968), this question is important to the utilization and management of the public lands.

II. THE QUESTION PRESENTED BY THIS COURT HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT.

Previous decisions by this Court have established that by acquiring title to lands or waters the United States gains a degree of legislative power over such property measured by the needs of the "governmental purposes for which the property was acquired." *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). This federal power derives from the Property Clause (*Id.*), and encompasses certain powers over wildlife located within the boundaries of the federal property. *Kleppe v. New Mexico*, —— U.S. ——, 96 S.Ct. 2285 (1976); *Hunt v. United States*, 278 U.S. 96 (1928).

Furthermore, although the powers flowing from the Property Clause may in some limited circumstances reach beyond the boundaries of the federal property to prohibit certain nuisance-like activities that threaten such property (*Camfield v. United States*, 167 U.S. 518, 525 (1897); *United States v. Alford*, 274 U.S. 264 (1927)), this Court, as it recognized in *Kleppe v. New Mexico*, *supra*, at 2295, has never determined "the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands" or, indeed anywhere other than on its own property.

As the Court of Appeals concluded, however, "the instant case presents the question left open in *Kleppe*." 8th Cir. Op. at 7. It is a serious constitutional question of far-reaching consequence. The States of Minnesota and Wisconsin firmly believe that this Court ought to resolve it.

III. THE DECISION OF THE COURT OF APPEALS GOES FAR BEYOND THE PRINCIPLES ENUNCIATED BY THIS COURT IN PREVIOUS DECISIONS INVOLVING EXTRATERRITORIAL APPLICATIONS OF THE PROPERTY CLAUSE.

On just three occasions has this Court considered the application of federal statutes or regulations adopted under the Property Clause to areas outside federal property. *United States v. Alford*, *supra*; *Colorado v. Toll*, 268 U.S. 228 (1928); and *Camfield v. United States*, *supra*.[9] *Toll* must be considered to state the general rule and the other two decisions to state exceptions to that rule.

Toll is the only one of the three that involved Park Service regulations. There, the Park Service had attempted to regulate the use of state and county highways by "automobile . . . carrying pasengers who are paying . . . for the use of the machines." *Id.* at 229. The State of Colorado argued that such

[9] *McKelvey v. United States*, 260 U.S. 353 (1922), is sometimes cited as a fourth case, but although it mentions *Camfield* and involves the same statute, the wrongful act occurred on federal land. *Id.* at 355-56.

regulations could not apply to state and county highways "without an act of cession from it and an acceptance by the national government." *Id.* at 231. The district court had dismissed the state's action, but this Court reversed, noting that "[t]he cases cited for the defendant do not warrant any such extension of the power of the United States over land within a State." *Id.* The matter was thereupon remanded to the district court to determine whether there had been, as alleged by the United States, a "cession from the State." *Id.* at 231-32. *Cf. Arthur v. Fry,* 300 F. Supp. 622, 626 (E. D. Tenn. 1969), where the state had conveyed its title to the roads in Great Smokey National Park with only a reservation of the right of public use.

As a general rule, then, the Property Clause does not empower the United States to exercise jurisdiction over areas it does not own. This is hardly surprising since it is "obvious" that "the Property Clause is a grant of power only over federal property." *Kleppe v. New Mexico, supra,* at 2291. To the extent there are exceptions from this general rule, they must be found in either *Camfield* or *Alford.* But neither of those decisions goes further than to recognize that Congress may have a limited right to legislate the abatement of *nuisances* existing or occurring adjacent to federal property where necessary to prevent the destruction of federal property (*Alford*) or the monopolization of its use (*Camfield*).

In *Camfield* the question was whether a federal statute prohibiting the enclosure of federal lands could be applied to prevent the construction of a fence "a few inches inside" adjacent private lands. The fence was clearly an "evasion" of the law and was "manifestly intended to enclose the government's lands." *Camfield v. United States, supra* at 525. The *Camfield* Court considered this fence to be the sort of "aggressive annoy-

ance of one neighbor by another" (*Id.* at 523) normally considered to be a private nuisance. According to the Court:

> Considering the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is *clearly a nuisance,* and that it is within the power of Congress to order its *abatement,* notwithstanding such action may involve an entry upon the lands of a private individual.

Id. at 525. (Emphasis added.)

An identical situation existed in *United States v. Alford, supra,* except that there, instead of a fence, the nuisance prohibited by federal law consisted of the failure to extinguish a fire on private lands near "forest timber or other inflammable material" on adjacent federal land. On the authority of *Camfield* the Court concluded that the Property Clause provides Congress with sufficient authority to protect federal property from the threat of destruction by fire originating on adjacent non-federal lands.

But the Court of Appeals decision here goes far beyond the limited kinds of defensive regulations upheld in either *Camfield* or *Alford.* The instant decision permits the Park Service to regulate an activity (hunting) everywhere inside a 219,000 acre park without any kind of specific showing that particular areas of park land would be adversely affected by the regulated activity. This decision expressly includes 80,000 acres of lakes, some portions of which are miles from the nearest federal land. See National Park Service Map LNPMW-VOYA-1001 (Feb. 1969) which appears as an appendix hereto. Moreover, the decision implicitly recognizes the authority of the Park Service to extend these regulations to private lands as well, although at the present time the Park Service has chosen not to do so. See 36 C.F.R. §1.1(b). In addition, the decision ignores the co-

operative good faith effort of the State of Minnesota, acting through its Commissioner of Natural Resources, in restricting hunting and trapping in the area, with the one minor exception previously noted.

Such a "broad brush" treatment of the problem is at odds with the specific, localized approach upheld in *Camfield* and *Alford*. In fact, the Park Serivces' position is consistent only with the proposition that it possesses at least concurrent legislative jurisdiction everywhere within the park, regardless of land ownership.

Furthermore, the decision here abandons the concept of nuisance as a standard for determining when the federal government is justified in reaching beyond its own property to regulate activities within the scope of the Property Clause. Instead of looking for an actual, seriously adverse interference with the federal property, the Court of Appeals was satisfied with identifying a *potential* conflict of uncertain magnitude that might manifest itself in some circumstances. The Court of Appeals agreed with the speculation of the District Court that duck hunting "usually occurs within close proximity of adjacent land areas" and "ducks *may* be shot over the public lands and pellets from discharging guns *may* rain upon the public territory and not inconceivably, cause injury to other park users." Memorandum of the Dist. Ct. at 9. (Emphasis added.) See 8th Cir. Op. at 8. Likewise, both courts hypothesized that "normal duck migration patterns *may* be changed" and the presence of hunters in the area *may* "cause a substantially greater burden on adjacent park land than what was originally envisioned." Memorandum of the Dist. Ct. at 10. (Emphasis added.) See 8th Cir. Op. at 8. On this basis the Court upheld a prohibition of *all* hunting everywhere in the park (except on private lands).

Both in terms of the nature of the activity involved and the geographic extent of its extraterritorial effect, the regulation upheld in this case goes far beyond anything yet approved by this Court. In the interests of maintaining the delicate balance of the federal system this matter deserves review.

CONCLUSION

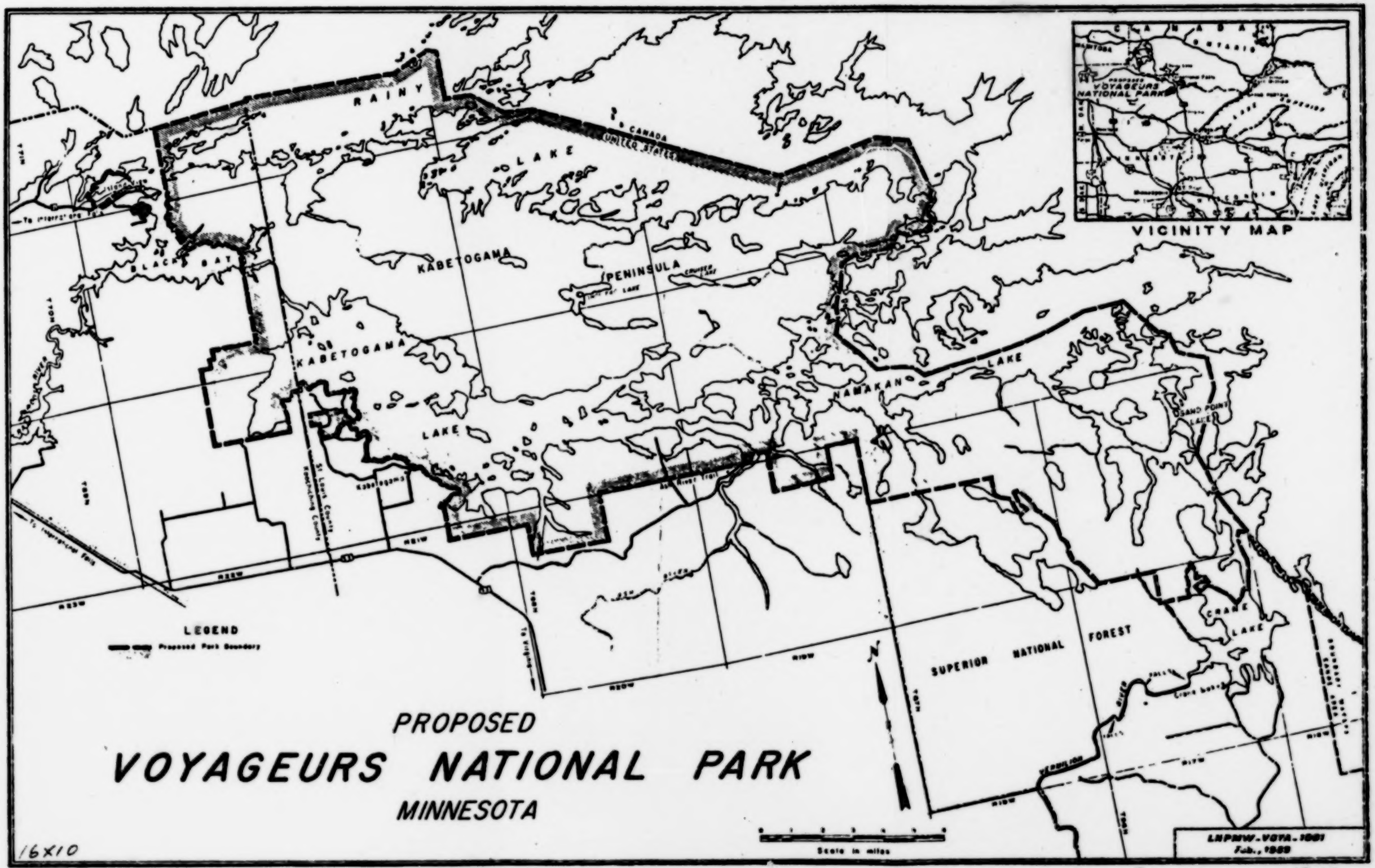
The regulations contained in Title 36, Chapter 1, of the Code of Federal Regulations, among which are those pertaining to hunting (36 C.F.R. § 2.32) and firearms (36 C.F.R. § 2.11), are written as general requirements for areas over which the Park Service has jurisdiction. The decision of the Eighth Circuit in the instant case is that the Park Service has jurisdiction over the entire area of the park because activities within the park might somehow affect the management of federal lands, no matter how far away the activity regulated may occur from federal lands, no matter what the particular use of the nearest federal land and no matter whether significant interference with the management of any particular federal land is actually occurring or likely to occur. This decision authorizes the unilateral extension of federal jurisdiction over portions of states on the merest speculation that a threat to federal land might exist. Before such a major expansion of federal jurisdiction under the Property Clause is sanctioned, with the resultant change in historic federal-state relationships, it should have the benefit of this Court's consideration. The petition should be granted.

Respectfully submitted,

BRONSON C. LaFOLLETTE
Attorney General of the
State of Wisconsin
Department of Justice
Madison, Wisconsin 53702

WARREN SPANNAUS
Attorney General of the
State of Minnesota
C. PAUL FARACI
Deputy Attorney General
PHILIP J. OLFELT
Assistant Attorney General
STEVEN G. THORNE
Special Assistant Attorney
General
375 Centennial Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-3294

Attorneys for Amici Curiae



PROPOSED

VOYAGEURS NATIONAL PARK

MINNESOTA

16X10

SHEET-9 NR-62